

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. 054-24-5271-D4
Issued to: Pedro AYALA:

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2333

Pedro AYALA

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1

By order dated 21 May 1980, an Administrative Law Judge of the United States Coast Guard at New York, New York suspended Appellant's seaman's document for four months, plus two months on nine months' probation, upon finding him guilty of misconduct. The specification found proved alleges that while serving as able seaman on board the United States SS MORMACSAGA under authority of the document above captioned, on 11 October 1979, Appellant assaulted and battered Simon Flax, the Boatswain, by striking him with a "4x4" wooden board.

The hearing was held at New York, New York on 27 November, 3 and 14 December 1979, 17 and 20 January and 13 February 1980.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification. The Investigating Officer introduced in evidence six exhibits and the testimony of three witnesses. In defense, Appellant offered in evidence his own testimony.

After the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. The entire decision was served on 31 May 1980. Appeal was timely filed on 13 June 1980 and perfected on 8 October 1980.

FINDINGS OF FACT

On 11 October 1979, Appellant was serving as able seaman on board the SS MORMACSAGA and acting under authority of his document while the vessel was in the port of Dar es Salaam, Tanzania.

At about 0800 on 11 October 1979 the Boatswain assigned Appellant to clean the bulwarks on the bow with soap and water. About 1300 the Boatswain asked Appellant if he had finished the bulwarks and if he had rinsed them with fresh water. Appellant

replied that he had finished them but had not rinsed them because he had not been told to do so. The Boatswain then told Appellant to rinses them so they could be painted.

Following the conversation, Appellant started to walk away from the Boatswain and then told the Boatswain that he wanted to speak to him. As the Boatswain started to walk toward Appellant to see what he wanted, Appellant turned around and picked up a 4"x4" wooden board about four feet long. Appellant said "I will kill you" or words to that effect and struck the Boatswain on the left side in the area of his belt with the board. The Boatswain turned around and ran with Appellant in pursuit.

The Boatswain attempted to get into the midship deck hose; however, the door, which opened outward, was closed and Appellant was close behind him. There is an alcove about three feet square to permit the door to open out on the deck without obstructing the passageway on deck. The Boatswain took refuge in this alcove, turned around, and raised his left arm to protect his face. Appellant struck the Boatswain with the board on the left forearm near the elbow. As Appellant lifted the board again, the Boatswain pulled it away from him and dropped it on the deck.

The Third Officer, Abraham DeLardge was also on deck at the time. He noticed a number of longshoremen on the deck running toward the gangway, so he proceeded to the gangway on board the vessel. When he arrived, he found the Boatswain in the alcove with his back to the door and Appellant facing him. The wooden board was in the recess near the Boatswain. Appellant and the Boatswain were arguing violently; however, the Third Officer was unable to understand what they were saying. The Third officer separated Appellant and the Boatswain.

At about 1445 the same day the Purser, who also served as Pharmacist Mate, treated the Boatswain for lacerations on the left forearm and lacerations and contusions on the left side of his body. The Boatswain declined to see a doctor ashore and was marked as fit for duty. On 20 October, while the vessel was in Durban, the Boatswain was examined by a doctor who prescribed medication for bruises and contusions of the left side, hematoma of the left elbow and upper arm and lacerations of the left forearm.

On 12 October 1979 Appellant was examined by a doctor ashore for abrasion on his cheeks alleged to have been received during the incident with the Boatswain. No apparent injuries were observed and he was declared fit for duty.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that:

1. The Boatswain provoked Appellant and that this provocation constitutes a complete defense.
2. the refusal of the Administrative Law Judge to admit into evidence the minutes of a union meeting was error and prejudiced Appellant.
3. Under the circumstances the sanction should be reduced to a probationary suspension.

APPEARANCE: Sidney Zwerling of Zwerling & Zwerling 160 Broadway
New York, New York 10038

OPINION

I

Appellant urges that the Boatswain provoked Appellant and that this provocation is a complete defense. I do not agree.

In support of his position Appellant argues that the Administrative Law Judge should have believed his testimony that the Boatswain called him a "spick" and "Puerto Rican bastard" and poked him in the face with his finger before the assault rather than the Boatswain's version of the events. Appellant discusses in some detail various reasons his testimony should have been believed. He does not assert that the findings are without a basis in the evidence.

Since there were no other witnesses to the actual assault, the Administrative Law Judge had to decide whether to believe Appellant or the Boatswain. In his Decision and Order he discussed at some length the evidence of the circumstances surrounding the assault and the extent to which the testimony of each of them was consistent with this evidence. In addition, he had the opportunity to observe the demeanor of the witnesses, including Appellant and the Boatswain. Ultimately the Administrative Law Judge concluded that the Boatswain was the more credible witness. His decision to believe the Boatswain was not unreasonable, although he could have legally decided to believe either the Boatswain or Appellant.

"It is the function of the judge to evaluate the credibility of witnesses in determining what version of events under consideration is correct. Commandant's Appeal Decision 2097 (TODD). The question of what weight is to be accorded to the evidence is for the judge to determine and, unless it can be shown that the evidence upon which he relied was inherently

incredible, his findings will not be set aside on appeal. O'Kon v. Roland 247 F. Supp. 743 (S.D.N.Y 1965)."

Commandant's Appeal Decision 2116 (BAGGETT). See also Commandant's Appeal Decisions 2099 (HOLDER), 2108 (ROYSE) and 2302 (FRAPPIER). Therefore, the Administrative Law Judge's findings with respect to the manner in which the events occurred will not be disturbed.

Even if the Administrative Law Judge had believed that the Boatswain provoked Appellant, this would not have justified the assault as Appellant asserts. Appellant does not assert, and it does not appear from the record, that he was ever in danger of serious physical harm or that his actions were necessary or even intended to protect himself from such harm. Thus, the issue of self-defense is not raised. Appellant does not cite any legal authorities in support of his theory that provocation can justify such an assault and battery. "The only real provocation which justifies the use of force is an actual attack leaving the victim with no means of defense except the use of force." Appeal Decisions 2193 (WATSON) and 2290 (DUGGINS). Even when force is authorized in self defense, it is well settled that only so much force may be used as is required to cause an aggressor to desist. Force which goes beyond the bounds of necessity is not justified. Appeal Decisions 2291 (MARGIOTTA), 1852 (HALL), and 1803 (PABON). Even if the Boatswain had poked Appellant in the face with his finger, Appellant would not have been justified in beating him with 4"x4" board.

II

Appellant next contends that the refusal of the Administrative Law Judge to admit into evidence the minutes of a union meeting held aboard the ship was error. I do not agree. In his brief, Appellant states that:

"The documents were offered to show the feelings of the crew towards the boatswain...[and] the shabby and prejudicial manner used by the boatswain towards Spanish members of the crew."

"A further reason the evidence should have been admitted is that it is supported by the testimony of several of the witnesses at the hearing. Harold Green testified that there had been complaints against the boatswain and that the boatswain was abusive to those under him. This evidence supports the conclusions of the union documents."

Appellant argues that 46 CFR 5.20-95 allows the admission of evidence without strict adherence to the rules of evidence. This

is true. However, "The Judge is charged with managing the record and insofar as possible excluding irrelevant and immaterial facts." Appeal Decision 2320 (MINTZ). See also 46 CFR 5.20-1(a) and 5.20-95(a). Here the evidence was admittedly cumulative of other testimony. In addition, I note that the Boatswain stated in his testimony that he had had difficulty with Appellant and others in the crew. The minutes of a meeting are of very limited probative value since they are only the notes of a secretary who has heard a witness. The Administrative Law Judge did not err in excluding the minutes of the union meeting.

III

Finally, Appellant contends that the sanction should be reduced to a probationary suspension. I do not agree that the sanction is excessive. The Administrative Law Judge ordered an outright suspension of four months and a further suspension of two months on nine months probation. This is lenient considering the fact that Appellant beat his superior severely with a heavy board. The Judge took into consideration that Appellant has been sailing in the merchant marine since 1947 and that this is his first offense of assault and battery. I find no reason to reduce the sanction.

CONCLUSION

There was substantial evidence of a reliable and probative nature to support the findings of the Administrative Law Judge. The hearing was fair and conducted in accordance with the requirements of applicable regulations. The sanction ordered was not excessive.

ORDER

The order of the Administrative Law Judge dated at New York, New York on 21 May 1980 is AFFIRMED.

B. L. STABILE
Vice Admiral. U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C., this 5th day of December 1983.